

No. 15505

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK L. SMITH, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

GEO. S. LEONARD,
Acting Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

SAMUEL D. SLADE,
B. JENKINS MIDDLETON,
Attorneys,

*Department of Justice,
Washington 25, D. C.*

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BRIEF FOR THE UNITED STATES

This action was brought by the United States to recapture meat subsidy payments which were made to appellee in 1945 under a meat subsidy program conducted in accordance with the first proviso of Section 2(e) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 902(e)). The payments, made on preliminary approval of appellee's subsidy claims, were subsequently invalidated by the Reconstruction Finance Corporation (RFC) (R. 3-8¹). The district court directed a verdict for appellee (R.

¹ References to the Transcript of Record printed on the appeal will be designated "R. —". References to Plaintiff's Exhibits Nos. 1 and 2, which were designated for printing but not printed, are to the exhibits themselves.

42), and on September 28, 1956 entered judgment on the verdict (R. 15-17). On November 5, 1956 the court entered an order denying appellant's motions for judgment notwithstanding the verdict and for a new trial (R. 18). The United States filed a notice of appeal from both the judgment and the order on January 2, 1957 (R. 18-19).

The jurisdiction of the district court rested upon 28 U.S.C. 1345. This Court's jurisdiction is invoked under 28 U.S.C. 1291.

STATEMENT OF THE CASE

The statutory background.—Section 2(e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U.S.C. App. (1946 Ed.) 902, authorized the Federal Loan Administrator to pay subsidies in such amounts and upon such terms and conditions as the Administrator, with the approval of the President, should determine to be necessary to obtain the required production of commodities previously determined by the President to be strategic or critical. The Section further provided that these subsidies were to be paid by corporations created and organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, 48 Stat. 1108, as amended, 15 U.S.C. 606(b)(3). Meat having been defined by the President as a "strategic or critical material", Section 2(e) thus had the effect of empowering the Federal Loan Administrator, with the approval of the President, to make the determination of the need for subsidy payments to producers of this commodity. And under the Stabilization Act of 1942, 56 Stat. 756, as amended, 50 U.S.C. App. (1946 Ed.) 961, *et seq.*, as supplemented by Executive Order 9250 (7 F.R. 7871), the Director of Economic Stabilization

was given overriding policy authority over all price and stabilization agencies. In carrying out this authority, the Director on May 7, 1943, ordered the Federal Loan Administrator to initiate the Livestock Slaughter Subsidy Program. On the same day, the Federal Loan Administrator (who was also Secretary of Commerce), directed the President of the Defense Supplies Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, to pay subsidies to livestock slaughterers, packers, and wholesalers. This directive was implemented by the issuance of Defense Supplies Corporation Regulation No. 3, which became effective June 7, 1943 (8 F.R. 10826), and which was reissued as Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4241). By Joint Resolution of June 30, 1945 (59 Stat. 310), Congress dissolved Defense Supplies Corporation and transferred its subsidy administration functions to Reconstruction Finance Corporation.

The large number of monthly subsidy claims (estimated to have been approximately 26,000) rendered it administratively impossible to make a rapid determination as to the accuracy or validity of each submitted claim. On the other hand, the prompt payment of claims was necessary in order to enable the slaughterers to continue operation. Accordingly, slaughterers were permitted to certify that their claims were accurate and that they had not wilfully violated any regulation of the Office of Price Administration or the War Food Administration during the monthly reporting period covered by the claims. The latter certification was required because, the subsidy program being an adjunct of price and distribution controls,

compliance with the regulations of related agencies was a condition precedent to entitlement to subsidy payments. Defense Supplies Corporation was authorized to pay, upon preliminary approval, duly certified subsidy claims.² The applicable regulations required, however, that RFC withhold or invalidate subsidies upon certification of the Office of Price Administration that it had been determined, in a court of first instance or by a hearing commissioner, that the slaughterer had violated a price regulation.³ D.S.C. Regulation No. 3, effective June 7, 1943, Section 10(a) (8 F.R. 10829); Revised Regulation No. 3, effective January 19, 1945, Section 7003.10 (a) (10 F.R. 4243), as amended by Amendment 3, effective May 5, 1945, 10 F.R. 8073 and 11153; Office of Economic Stabilization Directive 41, Section 7(b)(2) (10 F.R. 4494). See *infra*, pp. 22-23.

The facts of this case.—Appellee, a meat slaughterer doing business in Portland, Oregon, made claim for and received meat subsidies under this program (R. 26). In 1946, a hearing commissioner determined that appellee had violated the provisions of an applicable control order by slaughtering cattle and calves in excess of his quotas during the months of June, July and August, 1945 (letter, appellee to Slaughter Control Program, dated December 23, 1946, p. 1, third item in Plaintiff's Exhibit 2; see also R. 7-8). The Office of Price Administration certified this fact to RFC

² D.S.C. Regulation No. 3, effective June 7, 1943, Section 5(d) (8 F.R. 10827); Revised Regulation No. 3, effective January 19, 1945, Section 7003.9(c) (10 F.R. 4243).

³ The Price Administrator's functions with reference to the payment of subsidies were transferred to the Office of Temporary Controls upon the termination of OPA, and, upon termination of OTC, were given to Reconstruction Finance Corporation. Executive Order 9841, dated April 23, 1947 (12 F.R. 2645).

(*ibid.*). RFC, acting under the mandatory provisions of Section 7(b)(2) of Directive 41 of the Office of Economic Stabilization, thereupon invalidated the subsidy payments already made to appellee for those months in the amount of \$37,839.67 (R. 8). Of this amount, \$9,528.58 was recovered by application of the Government's claim to appellee's subsidy claim for June 1946, leaving a balance due on the Government's claim of \$29,244.74 (R. 8).

On December 15, 1950, appellee filed a telegraphic protest with RFC, requesting a review of the orders settling his subsidy account and stating that supporting data and further information would be submitted at an early date (first item in Plaintiff's Exhibit 2). According to RFC records, this protest was denied in a letter addressed to appellee dated June 25, 1951 (R. 7-8). The letter recited the administrative action which had been taken with respect to appellee's subsidy claims, and stated that "this should be considered a formal and final denial of your protest from which appeal lies only to a court having jurisdiction over such matters" (R. 8).

The Government filed its complaint seeking restitution of the invalidated subsidy payments on February 2, 1956 (R. 3-8), attaching the denial letter of June 25, 1951 to the complaint as Exhibit A (R. 7-8). Appellee's answer amounted to a general denial (R. 9). At the trial, appellee stipulated that he had filed the protest (R. 27) but denied receipt of RFC's denial letter (R. 29-30, 34).

At the close of the evidence, the Government moved for a directed verdict on the ground that the action of RFC in invalidating appellee's subsidy payments was

not subject to attack in the court below.⁴ The court denied this motion and instead granted appellee's motion for a directed verdict (R. 41-42).

The Government then moved for an order setting aside the verdict and for judgment in its favor, in accordance with its motion for a directed verdict (R. 14-15), suggesting at the same time that, if judgment were granted as prayed, the court might consider granting a stay of execution so that appellee might seek review of the invalidation of the subsidies in the Emergency Court of Appeals (see *infra*, p. 23). The court entered judgment on the verdict before passing on this motion (R. 15-17), and on October 1, 1956 the Government filed an alternative motion for a new trial (R. 17). On October 19, 1956, the Government filed a Supplemental Memorandum of Points and Authorities in which it again suggested that the court enter judgment for the United States but grant a stay to permit recourse to the Emergency Court of Appeals for a hearing on the merits, citing further authority for this course of action (see *infra*, pp. 23-25).

The district court rejected these suggestions and, in an order entered on November 5, 1956, denied both motions of the Government (R. 18). Notice of appeal from the judgment and order was filed on January 2, 1957 (R. 18-19).

⁴ With respect to appellee's alleged non-receipt of the letter denying his protest of this action, it was argued that even if appellee had not received the letter when it was first issued, he received it as an attachment to the complaint on February 8, 1956, and that appellee's failure to appeal the denial of his protest to the Emergency Court of Appeals within 30 days, as required by Section 204(a) of the Act, precluded any action by the court below which would have the effect of nullifying the order invalidating the subsidies (R. 32, 34, 39). We do not press this argument on this appeal.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in pertinent part in Appendix A, *infra*, pp. 19-23.

SPECIFICATION OF ERRORS

1. In this action by the Government to recover meat subsidy payments determined to be due it by an order of the Reconstruction Finance Corporation, the district court erred in entering a final judgment on the merits in favor of appellee.

2. The district court erred in failing to grant appellant's motion to set aside the verdict and for judgment for appellant, which motion was accompanied by the suggestion that the court stay execution of such a judgment pending final determination of the validity of the RFC order in the appropriate forum.

SUMMARY OF ARGUMENT

This is an action to enforce a debt created by an order of the RFC invalidating appellee's meat subsidy claims and demanding return of the subsidy payments which had been made upon a preliminary basis. Since such orders are issued under Section 2 of the Emergency Price Control Act of 1942, the validity of the order here in question is subject to review only in the Emergency Court of Appeals, under Section 204(d) of the Act. By entering judgment for appellee, however, the district court effectively invalidated the RFC order and destroyed the debt which the order created. In so doing the court plainly acted in excess of its jurisdiction.

The proper course for the district court to have followed was that urged upon it by the Government. At the trial, appellee insisted that he had never received

notice of the denial of his protest, and the Government was unable to prove that the notice of June 25, 1951 had in fact been mailed. As a matter of law, therefore, the protest had never been finally disposed of and was still pending before RFC. In these circumstances, the court below should have entered judgment for the Government as prayed, staying execution, however, to permit final action—administrative and, if necessary, judicial—disposing of the pending protest.

ARGUMENT

The District Court Should Have Entered Judgment for the Government, But Stayed Execution Pending a Final Determination, in the Proper Forum, of the Validity of the RFC Order Invalidating Appellee's Subsidy Claims.

A. The District Court Was Without Jurisdiction to Take Any Action Which Would Affect the Validity of the Order of the Reconstruction Finance Corporation Invalidating Appellee's Subsidy Claims.

Section 204(d) of the Emergency Price Control Act of 1942, *infra*, pp. 20-21, vests in the Emergency Court of Appeals “*exclusive jurisdiction* to determine the validity of any regulation or order issued under section 2 [of the Act] * * * and of any provision of any such regulation [or] order * * *” (emphasis added), adding that, “[e]xcept as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation [or] order * * *”. Section 203 of the Act (*infra*, p. 20) provides that review of such regulations or orders may be sought by the filing of a protest with the issuing agency. If the protest is denied, the protestant “may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, * * * specifying

his objections and praying that the regulation [or] order * * * protested by enjoined or set aside in whole or in part”⁵ (Section 204(a), *infra*, p. 20). The validity of these provisions is well established. See, e.g., *Yakus v. United States*, 321 U.S. 414, 429-430; *Samett v. Reconstruction Finance Corporation*, 165 F. 2d 605 (C.A. 10), certiorari denied, 334 U.S. 812; *Tambasco v. Reconstruction Finance Corporation*, 178 F. 2d 283 (C.A. 2); *Reconstruction Finance Corporation v. MacArthur Mining Co.*, 184 F. 2d 913, 917 (C.A. 8); *Swift & Co. v. Reconstruction Finance Corporation*, 183 F. 2d 456, 459 (C.A. 7); *Reconstruction Finance Corporation v. Burlison*, 171 F. 2d 329 (C.A. 5); *Duncan Coffee Co. v. Reconstruction Finance Corporation*, 178 F. 2d 926, 928-929 (Em. Ct. App.); *Merchants Packing Co. v. Reconstruction Finance Corporation*, 176 F. 2d 908, 912 (Em. Ct. App.).

The Livestock Subsidy Program was established pursuant to Section 2(e) of the Emergency Price Con-

⁵ Section 204(e)(1) of the statute also provided a second avenue for review by the Emergency Court. This section permitted courts in which enforcement actions, involving alleged violation of any regulation or order issued under Section 2, were brought pursuant to Section 205 of the Act or Section 37 of the Criminal Code, to grant the defendant leave to file a complaint against the Administrator in the Emergency Court contesting the validity of the regulation or order. Such leave was to be granted only in the event the court found “reasonable and substantial excuse for the defendant’s failure to present such objection in a protest filed in accordance with section 203(a) * * *”. An amendment to this section contained in the Supplemental Appropriation Act of July 30, 1947, 61 Stat. 619, terminated this jurisdiction except in a limited class of cases. *Woods v. Hills*, 334 U.S. 210; *Silver Pine Oil Co. v. Reconstruction Finance Corporation*, 205 F. 2d 835 (Em. Ct. App.); *Service Pipe Line Co. v. Reconstruction Finance Corporation*, 217 F. 2d 312 (Em. Ct. App.). This amendment makes it plain that this second avenue of review would not be available to appellee in the present case.

trol Act of 1942. Accordingly, an order invalidating a meat subsidy claim is an "order issued under section 2" within the meaning of the protest and exclusive review provisions of Sections 203 and 204(a) and (d) of the Act. *United States v. Bass*, 215 F. 2d 9 (C.A. 8); *Riverview Packing Co. v. Reconstruction Finance Corporation*, 207 F. 2d 415 (Em. Ct. App.); *Armour & Co. v. Reconstruction Finance Corporation*, 162 F. 2d 918 (Em. Ct. App.); *Belle City Packing Co. v. Reconstruction Finance Corporation*, 169 F. 2d 413 (Em. Ct. App.); *Wm. Schluderberg-T. J. Kurdle Co. v. Reconstruction Finance Corporation*, 169 F. 2d 419 (Em. Ct. App.), certiorari denied, 335 U.S. 846; *Merchants Packing Co. v. Reconstruction Finance Corporation*, *supra*; *Berchem v. Reconstruction Finance Corporation*, 191 F. 2d 922 (Em. Ct. App.).⁶ It is clear that, in the present case, RFC's mandatory invalidation of appellee's subsidy claims, pursuant to the Office of Price Administration's certification, constituted such an "order", as appellee recognized when he filed his protest seeking review of "the orders settling * * * livestock slaughter payment account" (telegram dated December 15, 1950, first item in Plaintiff's Exhibit 2). Cf. *United States v. Bass*, 215 F. 2d 9, 13 (C.A. 8); *Reconstruction Finance Corporation v. Service Pipe Line Co.*, 198 F. 2d 775 (C.A. 10); see also *Riverview Packing Co. v. Reconstruction Finance Corporation*, 207 F. 2d 361, 366 (C.A. 3); *Merchants Packing Co. v. Reconstruction Finance Corporation*, *supra*; *Riverview Packing Co. v. Reconstruction Finance Corporation*, 207 F. 2d 415 (Em. Ct. App.);

⁶ These cases thoroughly discuss the origin, legal basis, purposes and mechanisms of the meat subsidy program, as well as outlining the procedures involved in the invalidation and recapture of meat subsidy payments.

Armour & Co. v. Reconstruction Finance Corporation, supra; Somerville Dressed Meat Co. v. Reconstruction Finance Corporation, 159 F. 2d 716 (Em. Ct. App.); Silver Pine Oil Co. v. Reconstruction Finance Corporation, 205 F. 2d 835 (Em. Ct. App.).

The district court therefore had no jurisdiction to take any action which would adversely affect the validity of this order, or which would prevent or impede the enforcement of the debt created by that order.

B. The Judgment of the District Court in Favor of Appellee in Effect Constituted an Invalidation of the Order of the Reconstruction Finance Corporation in Excess of the Court's Jurisdiction.

The Government filed its complaint in this case on the basis of information in its files demonstrating that on December 15, 1950, appellee had protested the order invalidating his subsidy claims, and that on June 25, 1951, RFC had denied this protest in a letter-order addressed to appellee ⁷ (R. 7-8). At the trial, appellee stipulated that he had filed the protest (R. 27),

⁷In the normal course of events in cases of this kind, the Government follows the filing of the complaint with a motion for summary judgment, grounded on the district court's lack of jurisdiction to review the validity of the RFC orders and on the absence of factual issues. Such a motion was not filed in this case because appellee's Answer to Plaintiff's Request for Admission of Facts and Authenticity of Documents denied both the receipt of a claim receivable based upon the invalidation of the subsidy claims and receipt of the letter of June 25, 1951, denying the protest, thus raising factual issues (answers to requests for admissions numbered 5, 6, and 9, R. 10-13). That appellee had in fact received notice of the invalidation of his subsidies and of the claim receivable was, of course, demonstrated by his telegram protesting "* * * against the settlement of the livestock slaughter payments account * * *" and against "* * * the orders entered with respect to the subsidy payments as hereinbefore indicated * * *" (first item in Plaintiff's Exhibit 2, p. 1). This left a factual issue as to the receipt of the denial of protest.

but he persisted in denying that he had received the letter-order (R. 29-30, 34). In view of the lapse of more than five years between the dates of the letter-order and the trial, the normal difficulties encountered in attempting to prove the mailing of a letter, and the added obstacles created by personnel changes and administrative reorganization in closing out the expired subsidy program, the Government was unable to offer any evidence bearing upon the question of whether or not the letter of June 25, 1951 had in fact been either deposited in the mails by RFC or received by appellee.

Under the rule announced in *Amodio v. Reconstruction Finance Corporation*, 191 F. 2d 862 (Em. Ct. App.), the Government's failure of proof on this score constituted a failure to show any administrative action disposing of appellee's protest. That case held that a letter notifying the protestant of the denial of his protest takes effect as an order of denial only upon its deposit in the mails. As a matter of law, therefore, at the time of the trial the protest was still pending before RFC and the validity of the protested order had not yet been determined. In these circumstances, the district court, in this action based upon the still-outstanding RFC order establishing the debt of the defendant to the Government, directed a verdict for the defendant and entered judgment thereon.

We submit that in thus refusing to give effect to the order upon which the cause of action was based, the court below effectively invalidated the order and destroyed the debt which the order created. This action of the court was plainly in excess of its jurisdiction and an invasion of the exclusive province of the

Emergency Court of Appeals. See cases cited *supra*, pp. 9-11.

C. *The Course of Action Suggested to the District Court by the Government Was the Proper One to Adopt in the Circumstances of this Case.*

Despite the Government's failure to prove that final administrative action had been taken on appellee's protest, the proper course for the district court in the circumstances of this case was to enter judgment for the United States, in accordance with either its motion for a directed verdict or its subsequent motion for judgment notwithstanding the verdict, and to stay execution of the judgment, pending final disposition of appellee's protest by RFC and, if necessary, an appeal to the Emergency Court of Appeals.⁸ This was essentially the course urged upon the court below by the Government in its Memorandum of Points and Authorities in Favor of Plaintiff's Motion for Judgment Notwithstanding the Verdict and in its Supplemental Memorandum (*infra*, pp. 23-25). As authority for this procedure, the cases of *Silver Pine Oil Company v. Reconstruction Finance Corporation*, 205 F. 2d 835 (Em. Ct. App.), and *Reconstruction Finance Corporation v. Service Pipe Line Co.*, 198 F. 2d 775 (C.A. 10),

⁸Such a procedure would have been in accord with that required by statute in proceedings brought pursuant to the enforcement provisions of Section 205 of the Act or Section 37 of the Criminal Code. Section 204(e)(2) of the Act (*infra*, p. 21) provides that in any such proceeding involving an alleged violation of a regulation or order, "the court shall stay the proceeding * * * during the pendency of any protest properly filed by the defendant under section 203 * * * prior to the institution of the" enforcement proceeding (emphasis added). Such stays are to be granted, however, only after judgment and upon application made within five days after judgment.

were cited to the court (see *infra*, pp. 24-25). A brief outline of these cases will serve to show their applicability to the situation before the court below.

In *Silver Pine*, RFC had filed a civil suit in the district court to recover oil subsidies paid to Silver Pine. The claim was based upon a letter-order, demanding refund of the subsidy payments, which Silver Pine had not protested. The district court, ruling that it had no jurisdiction to review the validity of the letter-order, granted judgment for RFC but stayed execution and granted leave to Silver Pine to file an original complaint in the Emergency Court of Appeals, under Section 204(e)(1) of the Act, contesting the validity of the letter-order. The Emergency Court dismissed this complaint on the ground that it no longer had jurisdiction in such cases other than through an appeal from the denial of a protest under Section 204(a) of the Act (see *supra*, p. 9, fn. 5). The court therefore suggested the following procedure (205 F. 2d at 837):

* * * Silver Pine Oil⁴ Company may not be wholly without remedy in the present situation. For it would seem to be still possible for it to protest the letter order of April 13, 1948 and, if its protest is denied, to secure a judicial determination of the validity of that order by this court under Section 204(a) of the Act. If such a determination should ultimately be made in its favor it would appear that Silver Pine Oil Company would be entitled to have the judgment of the district court vacated under Section 204(e)(2) of the Act. Such relief could be granted by the court on motion under Fed. Rules Civ. Proc. rule 60(b)(6), 26

U.S.C.A. It may well be, therefore, that if Silver Pine Oil Company should promptly file a protest against the letter order of April 13, 1948 the district court, upon a proper showing, might stay execution of its judgment under Civil Procedure Rule 62(b) pending the termination of the protest proceeding. * * *

This suggested course was followed by Silver Pine, which filed its protest with RFC and obtained an order from the district court staying execution of the earlier judgment. After RFC denied the protest, Silver Pine sought review in the Emergency Court, which held the order invalid and set it aside. *Silver Pine Oil Co. v. Reconstruction Finance Corporation*, 222 F. 2d 721 (Em. Ct. App.).

The Service Pipe Line cases are particularly apposite here, since in RFC's suit against Service to recover oil subsidies, based upon an order invalidating the subsidies, the district court gave judgment for Service, on a ruling that Service was in fact entitled to the subsidies. On appeal, the Court of Appeals for the Tenth Circuit held that this ruling exceeded the jurisdiction of the district court because it invalidated the RFC order. The court of appeals therefore reversed and remanded, with directions to enter judgment for RFC as prayed. The district court was further ordered to stay execution of the judgment pending disposition of an ancillary suit in the Emergency Court of Appeals, filed pursuant to Section 204(e) of the Act, attacking the validity of the RFC order, should Service apply for leave to file such a suit. *Reconstruction Finance Corporation v. Service Pipe Line Co.*, 198 F. 2d 775 (C.A. 10); see also 206 F. 2d 814 (C.A. 10). Pursuant

to leave granted by the district court, Service filed a complaint which was dismissed by the Emergency Court for lack of jurisdiction, on the authority of its first *Silver Pine* ruling. "After that," noted the Emergency Court, "Service Pipe Line Company, following our suggestion in the Silver Pine Oil Company case, filed its protest with RFC against the letter-order" invalidating its subsidies. *Service Pipe Line Co. v. Reconstruction Finance Corporation*, 217 F. 2d 312, 318 (Em. Ct. App.). RFC denied the protest and Service filed its complaint in the Emergency Court. That court held the order invalid and set aside both the invalidation order and the order denying the protest. 217 F. 2d at 319.

Other cases furnish similar support for our position below and on this appeal. In *Woods v. Hills*, *supra*, the Supreme Court, in noting that the protest procedures were still available to defendants as a means of testing the validity of rent orders, stated that "[o]f course the District Court can withhold judgment so that it may give effect to any determination by the Housing Expediter or the Emergency Court of Appeals that might result from the defendant's pursuit of this remedy". 334 U.S. at 218, fn. 9.

United States v. Bass, *supra*, was a suit by RFC to recapture meat subsidy payments. Bass had protested the RFC invalidation order and RFC denied the protest on June 25, 1951. On July 26, 1951, Bass sought review by filing a complaint in the Emergency Court of Appeals. While this complaint was pending, the Government filed its recapture action in the district court. Upon the Emergency Court's dismissal of the complaint for late filing, the district court entered summary judgment for RFC. On appeal, the Court

of Appeals for the Eighth Circuit stated (215 F. 2d at 14):

* * * when this case came to trial in the District Court and the validity of the RFC's order was questioned, the only proper course for that court to pursue was to defer to the action of the Emergency Court of Appeals. And if the latter court had not passed upon the validity of the order it would have been appropriate for the court to hold the case in abeyance, as was ordered done by the Tenth Circuit in *Reconstruction Finance Corp. v. Service Pipe Line Co.*, 198 F. 2d 775, pending expeditious determination of the question in the Emergency Court of Appeals under Section 204(e) of the Act as amended, 61 Stat. 619, 50 U.S.C.A. Appendix, § 924(e).⁹

⁹ In an unreported subsidy recapture case, *United States v. Baellow*, still pending as No. 9067 in the District Court for the Western District of Missouri, Western Division, the defendant had failed to protest the RFC order invalidating his meat subsidy claims. After the Government filed suit the defendant filed a protest with RFC and moved in the district court for a stay of the proceedings. Judge (now Mr. Justice) Charles E. Whittaker granted the motion staying the proceedings "for such time as will allow defendant a reasonable opportunity to exhaust his administrative remedies, already begun, of protesting to Reconstruction Finance Corporation * * * and, if * * * unsuccessful, any available appellate remedy * * *".

CONCLUSION

In the light of the foregoing authorities, we respectfully request that the judgment of the court below be reversed and the case remanded, with directions to the district court to enter judgment for the United States, subject to being vacated should either of the forums having jurisdiction to pass upon the merits of the Government's claim, as embodied in the RFC order, determine that the claim is invalid. The district court should be further directed to stay execution of this judgment, pending such reconsideration as the General Services Administration, successor to RFC in this matter,¹⁰ may deem it necessary to give to appellee's protest before making a final and effective disposition thereof; and pending such efforts to seek review in the Emergency Court of Appeals as may prove necessary or as appellee may deem advisable.

GEO. S. LEONARD,
Acting Assistant Attorney General.

C. E. LUCKEY,
United States Attorney.

SAMUEL D. SLADE,
B. JENKINS MIDDLETON,
Attorneys,
Department of Justice,
Washington 25, D.C.

AUGUST, 1957.

¹⁰ RFC was dissolved, effective at the close of June 30, 1957, and its functions in connection with the matters here at issue were transferred to the Administrator of the General Services Administration, pursuant to the provisions of Reorganization Plan No. 1 of 1957, July 2, 1957, 22 F.R. 4633.

APPENDIX A

1. The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U.S.C. App. (1946 Ed.) 901, *et seq.* are as follows:

Section 2 [50 U.S.C. App. 902]

* * * * *

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; * * *

Section 203 [50 U.S.C. App. 923]

(a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * *

Section 204 [50 U. S. C. App. 924]

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding. * * *

* * * * *

(d) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price

schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision.

(e) * * *

(2) In any proceedings brought pursuant to section 205 of this Act * * * or section 37 of the Criminal Code, involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

* * * * *

(ii) during the pendency of any protest properly filed by the defendant under section 203 * * * prior to the institution of the proceeding under section 205 of this Act * * * or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceed-

ings only after judgment and upon application made within five days after judgment. * * *

2. Defense Supplies Corporation Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4243), as amended by Amendment No. 3, effective May 5, 1945 (10 F.R. 8073 and 11153), provides in pertinent part as follows:

Section 7003.9(c). *Frequency.* Payments will be made monthly upon preliminary approval of the claim.

* * * * *

Section 7003.10(a). *Compliance with Other Regulations.* Defense Supplies Corporation shall declare invalid, in whole or in part, any claim by an applicant who, in the judgment of the War Food Administrator or the Price Administrator, has wilfully violated any regulation or order of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat, and any claim of any applicant who the Price Administrator certifies to Defense Supplies Corporation has been determined in a civil proceeding to have violated a substantive provision of any regulation or order of the Office of Price Administration applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat.

3. Directive 41 of the Office of Economic Stabilization (10 F.R. 4494), provides in pertinent part as follows:

Section 7 (b) (2). Upon a *nisi prius* determination in a civil action or proceeding (including a proceeding before a hearing commissioner) against

a subsidy applicant, that such applicant has violated any substantive provision of an Office of Price Administration meat or livestock regulation or order, the Office of Price Administration shall certify the determination to Defense Supplies Corporation, including the period of time during which the violation is found to have occurred. Defense Supplies Corporation shall thereupon withhold payment of all subsidy claims of the applicant for the accounting period in which the violation is found to have occurred.

APPENDIX B

1. The Memorandum of Points and Authorities in Favor of Plaintiff's Motion for Judgment Notwithstanding the Verdict, filed on September 26, 1956, reads as follows in pertinent part:

* * * it is agreed that in the event the Court grants judgment as prayed for in plaintiff's motion, the defendant might desire to seek a stay of the execution of judgment, pending an attempt on the part of the defendant to get a hearing in the Emergency Court of Appeals. If such a motion is filed under such circumstances, the Court might, in the exercise of its discretion, consider the granting of such a stay of execution of the judgment.

2. The Plaintiff's Supplemental Memorandum of Points and Authorities, filed on October 19, 1956, as a supplement to the Memorandum of Points and Authorities in Favor of Plaintiff's Motion for Judgment Notwithstanding the Verdict, reads as follows:

On Page 7 of Plaintiff's Memorandum of Points and Authorities in the above entitled matter it was suggested that in the event the Court granted Plaintiff's motion for judgment, notwith-

standing the verdict, defendant might at that time move for a stay of the execution of the judgment to allow him to appeal to the Emergency Court of Appeals if he deemed that move desirable, under the authority of *Silver Pine Oil Company v. RFC*, 205 F2d 835.

In a case somewhat similar to this one, but arising out of the oil well subsidy program, the Court of Appeals for the Tenth Circuit utilized this procedure as a means of accomplishing substantial justice. The case of *RFC v. Service Pipeline Company*, 198 F2d 775 (CCA 10, 1952) held on rehearing that a letter from the RFC which was claimed by RFC to be a final order depriving the District Court of jurisdiction had been made a part of the record as though it was attached to the complaint. The Court stated on page 781:

“So considered, the amended complaint, as of the date of this opinion, constitutes an action for the enforcement of the order, determining that appellees were not entitled to the subsidy payments, and this action to enforce shall be deemed to have been commenced as of the date of the mandate of this Court.”

The Court reversed the judgment and remanded the cause with directions to enter judgment for appellant RFC as prayed for in its complaint, provided however that if the defendant Service Pipe Line should apply to the District Court for leave to file in the Emergency Court a complaint against RFC attacking the validity of the order, the judgment should be stayed pending disposition of the proceedings in the Emergency Court of Appeals.

Since the most defendant can demand is a hearing in this matter, it is suggested that this Court

might utilize the authority of *RFC v. Silver Pipe Line Co.*, supra, and *Silver Pine Oil v. RFC*, supra, to grant judgment to the United States in this case with a stay of the execution of judgment to enable the defendant to petition the Emergency Court of Appeals for a hearing on the merits.

